



## SEC Final Rules Regarding Proxy Statement Disclosure

### I. Introduction

This Advisory highlights the key aspects of the final disclosure rules adopted by the SEC in July.\* The final rules are substantially similar to the rules proposed in January. The rules primarily affect proxy statement disclosure of executive and director compensation and transactions with the issuer, as well as requiring additional disclosure regarding director independence and compensation committee procedures. They also revise the Form 8-K disclosure requirements affecting executive compensation.

The general approach of the rules is to require that all elements of compensation be included in prescribed tabular form, together with narrative disclosure consisting of an overview discussion of the company's general compensation policies and specific disclosure to amplify and explain the tabular information. The new proxy statement disclosure is required to be provided under the principles of "plain English" – short sentences, everyday words, and frequent use of tables, bullet points, and other graphic elements.

The new disclosures will generally be required for proxy statements and Forms 10-K for fiscal years ending on or after December 15, 2006, and for 8-K triggering events occurring on or after 60 days after publication in the Federal Register.

**Because the new rules significantly expand the required proxy statement disclosures, companies would be well-advised to begin planning for compliance now if they have not already done so.**

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\*This Advisory does not discuss the rules applicable to small business issuers, which require significantly less disclosure, or the requirements applicable to foreign private issuers, which will continue to be determined as provided in Form 20-F.



## II. Disclosure of Executive Officer Compensation

### A. *Which Executives are Covered*

The named executive officers (NEOs) whose compensation is required to be described in the proxy statement are:

- Every person serving as Principal Executive Officer (PEO) or Principal Financial Officer (PFO) during the prior fiscal year, regardless of compensation;
- The three highest paid additional executive officers serving at year-end; and
- Up to two additional individuals who would have been among the most highly-paid executive officers, but who left before year-end.

In a change from the current rules, the determination of the most highly-paid executive officers is based on total compensation as reported in the Summary Compensation Table, but excluding the portion of compensation attributable to increases in pension benefits and earnings on deferred compensation. In addition, while officers other than the PEO and PFO previously could be omitted from the disclosure if their salary and bonus were below \$100,000, this \$100,000 threshold for excluding officers now applies to their total compensation (less increases in pension benefits and earnings on deferred compensation) – which may increase the number of officers whose compensation is required to be disclosed in the case of smaller issuers.

The SEC did not adopt the so-called “Katie Couric” proposal which would have required disclosure of the job position and total compensation of up to three employees who were not executive officers but whose compensation exceeded that of any of the NEOs. Instead, the SEC continues to seek comments on a modified version of this proposal which would limit the disclosure to employees who “exert significant policy influence” at either the company, a significant subsidiary, or a principal business unit, division or function of the company.

### B. *Compensation Discussion and Analysis (CD&A)*

The final rules call for a “Compensation Discussion and Analysis” (CD&A) modeled on the Management’s Discussion and Analysis (MD&A) currently required as part of annual and quarterly Exchange Act reports. It will be subject to the same liability as the rest of the proxy disclosure and covered by the CEO/CFO certifications in the company’s Annual Report on Form 10-K.

The CD&A is intended to provide an overview of the company’s compensation policies and the decisions made in implementing those policies. It is required to address at least the following specific items:

- the objectives of the company’s compensation program;
- what the program is designed to reward;

- identification of each element of compensation;
- why the company chooses to pay each element;
- how the company determines the amount or formula for each element of pay; and
- how each element (and decisions regarding that element) fits into the company's overall compensation objectives and affects decisions regarding other elements.

The rules include a list of examples of the types of information that should be considered for inclusion in the CD&A, where such information is material to the particular company, including:

- the company's policies for allocating between current and long-term compensation, and between cash, non-cash, and other forms of compensation;
- how specific forms of compensation are structured to reflect individual performance and/or company performance, and the measures of performance that are taken into account;
- the extent to which the compensation committee has discretion to increase or decrease the amount of performance-based awards, and whether any such discretion has been exercised;
- the factors considered in any material increase or decrease of compensation;
- the effect of tax or accounting treatment on compensation design;
- a discussion of any benchmarking used in setting any element of compensation, including identification of the comparator companies;
- how wealth accumulation from prior awards is taken into account in setting other elements of compensation;
- the company's stock ownership guidelines, including company policies with respect to hedging of company stock; and
- the role of executive officers in determining executive compensation.

Items that did not appear in the proposed rules, but were added to the final rules in response to comments or to address concerns over stock option granting practices, include the following:

- how the company determines when awards are granted;
- the company's policies regarding executive repayment of performance-based awards if the performance measures they were based on are subsequently restated; and



- the basis for selecting payment triggers (e.g. single versus double triggers in change of control agreements).

While not separately enumerated in the text of the rules, the SEC Adopting Release states that the following items should also be addressed in the CD&A where relevant:

- methods used to set option exercise prices (including any decisions to price options using the market price on a date other than the grant date or using a price other than the closing price); and
- the company's "program, plan or practice" regarding the coordination of option grants and the release of material information (which could involve decisions to either accelerate or delay the date awards are granted or the date the information is released).

**Comment:** The Release also states that disclosure would be required if the company has made a such decision regarding the timing of option grants since the beginning of the prior fiscal year.

The CD&A must cover decisions made and policies adopted after the end of the fiscal year as well as those made in prior years if they affect compensation for the most recent fiscal year. Thus an employment agreement entered into years ago that is still in effect would be within the ambit of the required disclosure.

Companies need not disclose target levels with respect to performance-based awards if they involve confidential commercial or financial information whose disclosure would result in competitive harm. However, if target levels are not disclosed, the CD&A must disclose the likelihood or difficulty of meeting the target levels.

In response to comments seeking to retain compensation committee accountability for the disclosures regarding executive compensation, the final rules reinstate a compensation committee report. This report, modeled on the current audit committee report, requires the committee to state whether it reviewed the CD&A with management and whether it recommended that the disclosure be included in the 10-K and proxy statement. The compensation committee report is required to be incorporated into the Form 10-K, but is treated as "furnished" rather than "filed." The SEC contemplates that the CEO and CFO would rely on the report in certifying the CD&A.

The final rules remove the Performance Graph from the proxy statement and require it to instead be included in the annual report to shareholders. It continues to be "furnished" to the SEC rather than "filed."

### ***C. Summary Compensation Table (SCT)***

As proposed, the Summary Compensation Table has separate columns for salary, bonus, stock awards, option awards, non-equity incentive plan compensation, all other compensation, and a “total” column showing the sum of all the other columns in the SCT. The final rules move increases in pension value and earnings on non-qualified deferred compensation into a separate column (as opposed to including them in All Other Compensation).

The SCT is generally required to disclose compensation for each of the last three fiscal years, but the rules allow companies to phase in use of the new format, so that only one year of information is required in 2007 and two years in 2008.

#### ***Stock and Option Awards***

- The Stock Awards column includes all “full value” equity awards, whether payable in cash or stock, such as restricted stock, RSUs, and phantom shares. Performance-based awards valued or payable in stock are also included. Stock options, stock appreciation rights and other awards based on an increase in the value of a share are reported in the Option Awards column. The amount to be reported for both stock and option awards is the grant date value of the award as determined under FAS 123R – without spreading the value over the vesting period. A footnote to the table must provide a cross-reference to the company’s disclosure (in its financial statements or MD&A) of the assumptions used in the valuation of stock and option awards.
- In a change from the proposed rules, if an equity award is modified (including repricing or extension of options and acceleration of vesting for other awards), only the incremental fair value of the modified award as determined under FAS 123R (rather than the full value of the modified award) needs to be disclosed. Reload options which are treated as new grants under FAS 123R would be reported as new grants in the SCT.
- In another change from the proposed rules, dividends on stock and option awards need not be included in the columns for those awards. Such dividends need not be separately reported if the right to receive dividends was taken into account in determining the fair value of the award. Dividends not taken into account in valuing the grants would need to be reported in the All Other Compensation column when paid.



## *Non-Equity Incentive Plans*

- The Non-Equity Incentive Plan Compensation column reports amounts earned under “non-equity incentive plans” – defined as performance-based plans that are outside the scope of FAS 123R. Amounts are reported when the performance measures are satisfied (i.e. when the amounts are “earned”), regardless of when paid.

**Comment:** A non-equity performance award would be reported in the year the satisfaction of the performance targets is determined, even if the award is subject to additional service requirements for vesting. In this case, no further disclosure is required in the SCT at the time the award is subsequently paid out.

- Earnings on outstanding non-equity incentive plan awards must be included in the Non-Equity Incentive Plan Compensation column, and quantified in a footnote.

## *Increase in Pension Benefits and Earnings on Deferred Compensation*

- As proposed, the SCT must include the increase in actuarial present value of benefits under both qualified and nonqualified defined benefit and actuarial plans. This would reflect any increase in benefits due to additional years of service, compensation increases, and plan amendments, as well as changes in value attributable to interest.
- In a change from the proposed rules, only above-market or preferential earnings on deferred compensation and nonqualified defined contribution plans are required to be shown in the SCT.
- The two components of the Increase in Pension Benefits and Earnings on Deferred Compensation column must be separately quantified in a footnote. If the change in value of pension benefits is negative, it cannot be used to reduce the amount shown in the table.

## *All Other Compensation*

- The types of compensation specifically required to be shown in the All Other Compensation column include company contributions to defined contribution plans (qualified and nonqualified), tax “gross-ups” and other tax reimbursements, perquisites (if \$10,000 or more), dividends or earnings paid on stock or option awards that were not factored into the grant date fair value reported for such awards, life insurance premiums paid by the company (other than group term insurance available on the same terms to salaried employees generally), discounted stock purchases (unless available to salaried employees generally), and amounts “paid or accrued” in connection with an NEO’s termination of employment or a change of control. For this purpose an “accrued” amount is an amount for which payment has become due.

- The SEC Adopting Release clarifies that the All Other Compensation column is required to include all compensation not otherwise included in the SCT, with three exceptions: (1) perquisites, if their aggregate value is less than \$10,000; (2) market rates of earnings on deferred compensation; and (3) group life, health, hospitalization, and medical reimbursement plans that are available on nondiscriminatory terms to salaried employees generally. (Amounts paid under relocation programs can no longer be excluded from the SCT, even if such programs are available to salaried employees generally.)
- Each type of compensation exceeding \$10,000 must be separately identified and quantified in a footnote.
- If the aggregate value of perquisites for any NEO is \$10,000 or more, each perquisite must be identified in a footnote, but the value of the particular perquisite must be provided only if it exceeds the greater of \$25,000 or 10% of the officer's total perquisites. Tax gross-ups related to perquisites must be identified and included in the table even if the underlying perquisite is below the disclosure threshold.

The SEC Adopting Release provides additional guidance for differentiating between business expenses and perquisites. The determination requires a two-prong analysis.

- First, is the item “integrally and directly related” to the performance of the executive’s duties – i.e. does the executive “need it to do the job?” If the answer is yes, the item is not a perquisite, even if it provides a personal benefit (e.g., a company-provided laptop). In such a case, it is not necessary to disclose the incremental cost of what was provided over a less expensive alternative (e.g., first class airfare versus coach for business trips).
- Second, if an item is not “integrally and directly related” to the performance of the executive’s duties, does it confer “a direct or indirect benefit that has a personal aspect”? If so, it is a perquisite unless it is available on a nondiscriminatory basis to all employees. Under this prong of the analysis, an item would be a perquisite even if there is a business reason for providing it (for example, providing helicopter service to enable the executive to commute to work faster) unless available to employees generally.

As under the current rules, perquisites are valued at their incremental cost to the company. The new rules add the requirement of footnote disclosure of the methodology for computing the incremental cost.

The Summary Compensation Table must be supplemented by narrative disclosure of “any additional material factors necessary to an understanding” of the information in the table. This would include a discussion of material aspects of a plan or employment agreement that make the tabular disclosure more meaningful.

#### ***D. Award Grant Table***

The Summary Compensation Table is supplemented by an award grant table, modeled loosely on the current option grant table and LTIP table, providing information on all equity and non-equity awards granted in the prior year, on a grant by grant basis. In addition to the grant date (which is required for all stock and option awards) and the exercise price (which is required for all option awards), the information called for by the table depends on the type of award:

- For non-equity incentive awards – the estimated payout (in dollars) at threshold, target, and maximum levels of performance.
- For equity incentive awards – the estimated payout (in number of shares or options) at threshold, target, and maximum levels of performance.
- For time vested stock and option awards – the number of shares or options awarded.

In response to the current concerns regarding option grant practices, the table expressly calls for the following additional disclosures:

- If the option exercise price is less than the closing market price on the date of grant, an extra column must be added showing the closing market price on the date of grant, and a footnote or the accompanying narrative must describe the methodology for setting the exercise price.
- If the date of board or committee action or deemed action making the award is different from the date of grant as determined under FAS 123R, a column must be added showing the date of the board or committee action or deemed action.

**Comment:** This could arise in two situations – (1) where grants made by written consent are made “as of” a particular date which differs from the date on which the last required signature is obtained, and (2) where the FAS 123R grant date is after the date of board action due to a failure to promptly communicate the award to the award recipient.

The narrative supplementing the award grant table is required to include a discussion of the material terms of each grant, including the vesting schedule, performance criteria, and the formula for determining the amount of the award which has been earned. The narrative must also state whether dividends will be paid on the equity awards and, if so, the applicable rate and whether it is preferential. In addition, the narrative must describe any material modifications that were made in the prior year to outstanding awards. These would include not only option repricings, but also material changes in vesting schedule or performance conditions.

#### ***E. Outstanding Equity Award Tables***

The new rules call for two tables to disclose compensation realized and potential compensation resulting from equity awards made in prior years.

##### ***Outstanding Equity Awards at Fiscal Year-End***

This table has been significantly revised from the proposal.

- With respect to stock option awards, information is required to be provided separately for each outstanding award (defined as options having the same exercise price and expiration date). The exercise price and expiration date must be shown for each option and the option must be classified in one of the following three categories – (1) unexercised but exercisable options, (2) options not yet exercisable, and (3) options subject to performance conditions which have not yet been satisfied. For options in the third category, once the performance condition is satisfied the option is moved into one of the other two categories, as applicable.
- With respect to stock awards, the outstanding awards are divided into two categories – (1) shares subject to time vesting, and (2) shares subject to performance vesting. For each category, the table is required to show the aggregate number of unvested or unearned shares in the category and their market value at fiscal year end. For performance-vesting awards, the number of shares and value is determined using the threshold level of performance unless a higher level has already been attained. As in the case of options, a performance award moves to the time-vested category if there is an additional vesting period after the performance conditions have been met.
- The vesting date for each award must be shown in a footnote.



## ***Option Exercises and Stock Vested***

This table is required to show the number of shares acquired on exercise of options or SARs or on the vesting of full-value shares, together with the dollar value realized upon exercise (i.e. the spread) or vesting. These amounts are shown in the aggregate for all exercises and all vestings, respectively, during the year. Footnote disclosure is required of any amount that would have been realized on exercise or vesting, but was deferred.

## ***F. Post-Employment Compensation***

The post-employment compensation disclosure, consisting of two tables each with explanatory narrative, and a separate narrative-only portion, is intended to lay out the payments to be received by an NEO following termination of employment.

### ***Pension Benefits Table***

In a significant change from the proposed rules, the final rules require, separately for each qualified and nonqualified defined benefit plan, disclosure of each NEO's pension benefits, stated in the form of the lump sum present value of the executive's benefit commencing at the plan's normal retirement date. The calculation assumes that the executive will continue working until normal retirement age at his/her current pay levels and otherwise uses assumptions that are consistent with those used for financial reporting of pension obligations. Allocation of benefits between a qualified and supplemental non-qualified plan is to be based on the qualified plan limits in effect for the prior fiscal year. The table must also show the number of years of service credited under each plan and the amount of any pension benefits paid during the last fiscal year.

The narrative to the table is required to describe the material factors necessary to an understanding of the table. These include the benefit formula and, to the extent applicable, eligibility and vesting conditions, early retirement provisions, available forms of benefit and how they affect the amount of the NEO's annual benefit, the effect of any service credit granted in excess of the executive's actual service, and the reason for having multiple plans.

### ***Nonqualified Deferred Compensation Table***

This table requires disclosure, for each nonqualified deferred compensation plan, of the amount of each of the executive's and the company's contributions in the last fiscal year, total earnings in the last fiscal year, amounts distributed or withdrawn during the last fiscal year, and the account balance at fiscal year end. Footnotes are required to quantify the portion of contributions and earnings reported in the current SCT, as well as the portion of the aggregate account balance that was reported in summary compensation tables for prior years.

The narrative accompanying the table must include a discussion of the types of compensation that are able to be deferred and any applicable limitations on deferral, information regarding the measures for calculating plan earnings, quantification of the rates of return, and material terms with respect to payouts.

### ***Other Post-Employment Payments***

In a departure from the tabular format, the rules require only narrative disclosure of each written or unwritten contract, plan or arrangement providing for payments after termination of employment or upon a change of control. The disclosure is required to identify the type and amount of each payment the NEO would receive upon each of resignation, retirement, termination (or constructive termination) by the company, reduction in job responsibilities, and a change of control. The narrative must describe the circumstances that trigger each payment, the amount of any lump sum payment, and the amount and duration of any non-lump sum payments, any differences in payment or benefits due to the nature of the trigger event, any conditions on receipt of payments such as non-competes, and any other material information. Perquisites are expressly required to be included in the disclosure under the same disclosure and itemization rules as apply for the SCT. Post-termination health care benefits must be quantified using the assumptions used to value such benefits in the company's financial statements. Amounts payable to salaried employees generally that do not discriminate in favor of executives may be excluded from the discussion.

Payments under pension plans and nonqualified deferred compensation plans may be disclosed by a cross-reference to the tables showing such benefits. However, if the trigger event would result in an enhancement or accelerated vesting of such benefits, these effects must be described and quantified.

The rules make clear that payment amounts must be quantified even if the amounts are uncertain. The company would be required to make reasonable estimates (which may include a range) and disclose the material assumptions underlying those estimates. The calculations are required to be made on the assumption that the trigger event occurred on the last business day of the last completed fiscal year and valuing company stock at the closing market price on that date.

### **III. Disclosure of Director Compensation**

The final rules require presenting the information about director compensation in tabular form. The table is modeled after the Summary Compensation Table, and requires the compensation for each director to be broken down into cash fees, stock awards, option awards, non-equity incentive compensation, increases in pension value and earnings on nonqualified deferred compensation, and all other compensation, with a column showing total compensation.



- In general, the disclosure requirements for the Director Compensation Table are analogous to those for the SCT. However only one year of information is required.
- Several directors can be grouped in a single row if all of the elements of their compensation are identical.
- Footnote disclosure is required of the aggregate stock awards and option awards held by each director at year-end.
- Disclosure of the components of the All Other Compensation column (including perquisites) is subject to the same rules as the SCT. In addition to the types of compensation enumerated for the All Other Compensation column of the SCT, the Director Compensation Table includes consulting fees and costs under director legacy and similar programs (which must also be described in a footnote). As in the case of the SCT, any compensation paid in a form other than those enumerated must also be included.
- If a director is an NEO, his or her compensation as a director must be included in the SCT and need not be included in the Director Compensation Table. However, director compensation must be identified as such by footnote to the SCT.

The table must be accompanied by narrative disclosure necessary to provide an understanding of the table. This would generally include a break-down of the types and amounts of cash fees, as well as a description of the standard compensation arrangements for directors and of any different arrangement for any particular directors.

## IV. Related Party Transactions

### A. *Disclosure Of Related Party Transactions*

The final rules reorganize and substantially revise the disclosure of related party transactions called for by Item 404 of Regulation S-K. The general principle behind the requirement remains the same – disclosure is required of any transaction since the beginning of the company’s last fiscal year or any currently proposed transaction, in which the company is a participant, and in which any related person had or will have a direct or indirect material interest – except that the dollar threshold for the disclosure has been doubled to any transaction or series of similar transactions where the amount involved exceeds \$120,000. Many of the specific instructions providing bright line rules for disclosure in particular situations have been eliminated in favor of the more general materiality standard. However, the rules retain certain hard wire exemptions from disclosure, including the provision that an interest in a transaction is not a material indirect interest if it arises solely from a position as a director and/or holder of certain equity interests in an entity that has engaged in a transaction with the issuer.

- Item 404 requires disclosure of both transactions and relationships. The disclosures previously called for by Item 404(b) (including business relationships between the issuer and a company with which a director had specified relationships) are now to be analyzed for disclosure under the 404(a) framework.
- The standard of materiality remains the same, and is determined on the basis of the significance of the information to investors in light of all the circumstances.
- The standards for disclosure of indebtedness are the same as for other related party transactions (except that they do not apply to persons that are related parties solely by virtue of being 5%+ shareholders). The final rules thus extend the required disclosure to situations where a related party has an indirect material interest in an indebtedness transaction. In addition to the information currently required to be provided about indebtedness, disclosure is required of the amount of principal and interest paid during the period, as well as the interest rate.
- “Related parties” are executive officers, directors, nominees up for election, 5%+ shareholders, and immediate family members of any of them. For this purpose immediate family members are essentially the same as the persons currently covered by Item 404 – child, parent, spouse, sibling, mother-or-father-in-law, son-or-daughter-in-law, and brother-or-sister-in-law – plus stepparents, stepchildren and persons sharing the household of an executive officer, director, nominee, or 5%+ shareholder. Disclosure is required for all transactions in the prior year in which the related party had a material interest, including transactions occurring before or after the person had the relationship with the company which made him or her a related party.

**Comment:** The rules require disclosure of compensation paid by the company to immediate family members of directors and executive officers (whether or not such family members are themselves executive officers), subject to the general materiality and dollar thresholds.

**Comment:** Disclosure of compensation is not required to the extent provided under Item 402 (i.e. for NEOs and directors). Compensation of non-NEO executive officers must be disclosed under Item 404 unless it has been approved (or recommended to the full board) by an independent compensation committee or similar body.

**Comment:** Under Rule 16b-3, a committee of at least two Non-Employee Directors can exempt certain transactions from Section 16(b). The term Non-Employee Director is defined by reference to Item 404 of Regulation S-K. The changes to Item 404(a) of S-K may therefore affect the ability of directors to satisfy the definition.



## ***B. Procedures for Approval of Related Party Transactions***

The final rules require the proxy statement to include a description of the material features of the company's policies and procedures for the review, approval and/or ratification of related party transactions. The rules contemplate that this disclosure will generally include:

- the types of transactions that are subject to the company's review policy;
- the standards to be applied in reviewing related party transactions;
- the persons who are responsible for applying the review procedures (such as, for example, if a committee of the board of directors has this function); and
- whether the policies and procedures are written, and if not, how they are evidenced.

In addition, the company is required to identify any related party transactions disclosed in the proxy statement which were not subject to the review policies (other than transactions that occurred before the person became a related party), or where the applicable policies were not followed.

**Comment:** The requirement to describe the applicable policies and to state whether they are written will likely cause companies which have not previously adopted formal review policies to do so.

## **V. Corporate Governance Disclosure**

The final rules collect the various corporate governance disclosures currently scattered throughout Regulation S-K and Schedule 14A and combine them into a single new Item 407 of Regulation S-K. New Item 407 also contains two new categories of corporate governance disclosure items.

### ***A. Director Independence***

The rules require a company to identify those of its directors (and director nominees) who are independent under the listing standards of the securities exchange on which the company's securities are listed. If a company is not listed on an exchange that imposes independence standards, it is required to identify its directors and nominees who are independent under the listing standards of an exchange of its choice. In either case, the company must identify any members of its audit, compensation or nominating committee who failed to meet the applicable independence standard.

If a company has adopted its own definition of independence, it must disclose whether the definition is available on the company's website (and, if so, the specific website address). If the definition is not available on the website, the definition must be distributed as an appendix to the company's proxy statement at least once every three years.

**Comment:** While the SEC Adopting Release does not expressly say so, this disclosure requirement seems to be aimed at independence standards such as those adopted pursuant to the New York Stock Exchange listing rule which requires that the independence determination go beyond the bright line criteria established by the NYSE, and which permits the company to comply by adopting its own categorical standards of independence.

In addition, for every director or nominee identified as independent, the company must describe the general nature of any transaction, relationship or arrangement with the company in which the director or his or her immediate family had an interest that was not disclosed as a related party transaction but that the board considered in determining that the director was independent. (This is a relaxation of the rule as initially proposed, which would have required disclosure of the specific details of any such transaction.)

#### ***B. Compensation Committee***

The new rules require extensive disclosure of the process and procedures of the compensation committee, generally patterned on the disclosure currently required about the nominating and audit committees. The new requirements include:

- the scope of the committee's authority and the extent to which it can delegate such authority;
- the role of executive officers in determining or recommending the amount or form of executive and director compensation; and
- the role of compensation consultants in the process, including the identity of the consultants, whether they were engaged directly by the compensation committee, the nature and scope of their assignment, and any special instructions given in connection with their assignment.

The company must also state whether the compensation committee has a charter, and either identify its location on the company's website or attach it to the proxy statement at least once every three years.

### **VI. Changes to Form 8-K**

The final rules, adopted substantially as proposed, in some ways expand and in other ways limit the disclosure of compensatory arrangements currently required by Form 8-K. In general, such arrangements are no longer covered by Items 1.01 (dealing with entry into or amendment of material contracts) and 1.02 (dealing with termination of material contracts) of Form 8-K and are instead covered by an expansion of Item 5.02 (currently dealing with election/appointment and departure of directors and specified executive officers).

- All named executive officers have been added to the list of persons whose departure triggers 8-K disclosure.

- Upon the appointment of directors or specified officers (the same officers whose appointment is currently subject to 8-K disclosure), the information required to be provided about the person includes a description of the material compensatory plans and arrangements such person will participate in that are entered into or materially amended in connection with the person's appointment, and any grants or awards (or modifications to awards) made to such person under any such plan in connection with their appointment.

**Comment:** Grants made in connection with such an appointment must be described even if the plan and form of grant have been previously described.

- Form 8-K reporting is also required with respect to the adoption or material amendment of any material compensatory plan or arrangement covering any of the current CEO or CFO or any named executive officer. Individual grants and awards are not reportable under this item if they are "materially consistent" with the terms of the plan and the company has previously disclosed such terms.
- For purposes of Item 5.02 of Form 8-K, named executive officers are those officers named in the company's most recent proxy statement. As a result, there is no need to make a special determination of who the NEOs are for terminations or plan adoptions early in the year.
- Form 8-K disclosure of compensation arrangements with non-NEO executive officers is no longer required unless they serve in specified job functions.
- The SEC Adopting Release clarifies that only a brief description of the material provisions of a compensatory plan or arrangement is required and suggests that the level of detail currently provided in many 8-K descriptions is unnecessary.
- If the salary or bonus of a named executive officer was excluded from the proxy statement because it could not be determined at the time the proxy statement was filed, an 8-K filing is expressly required to report the amount when it is determined – whether or not an 8-K would otherwise have been required – together with a revised calculation of the officer's total compensation.

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*This Advisory is for informational purposes only and is not intended as legal advice. For more information about the SEC's final disclosure rules or Hughes Hubbard's Corporate Governance Practice, please contact any of the following attorneys:*

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